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Filing date: **10/31/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205046
Party	Defendant Ate My Heart Inc.
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Signature	/Lisa M. Buckley/
Date	10/31/2013
Attachments	Gaga Pure Platinum_Reply and Buckley Declaration.pdf(306035 bytes )

In the Matter of U.S. Reg. No. 2,898,544 for  
GAGA PURE PLATINUM

Respondent.

Cancellation No. 92/055,279

Petitioner/Applicant Ate My Heart, Inc. (“AMH” or “Petitioner”), in accordance with Rule 527 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), 37 CFR §2.120(g), hereby submits this Reply Brief in support of its renewed motion for sanctions and request for judgment against Respondent/Opposer Christina Sukljian’s (“Sukljian” or “Respondent”) for her unyielding failure to comply with the Board’s most recent Discovery

Order, dated August 5, 2013 (the “Board’s Order”), in which the Board directed Sukljian to respond to AMH’s discovery requests (“Discovery Requests”), without objection to the merits, and to otherwise cooperate in discovery.

### **PRELIMINARY STATEMENT**

The following facts were not challenged by Sukljian and are therefore not in dispute:

- 1) The Board ordered Sukljian “to serve within **TWENTY DAYS** of the mailing date of [the Board’s Order] proper discovery responses without objection as to the merits, and where any claims of privilege are invoked, to provide the privilege log described above (or other support for her asserted privilege that is acceptable to AMH).”<sup>1</sup>
- 2) The Board further stated that “Ms. Sukljian is warned that if she does not properly respond to discovery requests as ordered herein, AMH may renew its motion for sanctions, including the sanction of entry of judgment in the cancellation.”<sup>2</sup>
- 3) The Board acknowledged that “Ms. Sukljian’s motions relating to discovery appear to be frivolous and interposed for purposes of delay. Further Ms. Sukljian is warned that the Board will not tolerate game playing or evasiveness in discovery. If the Board perceives such behavior in the future, then sanctions in the form of precluding Ms. Sukljian from introducing evidence on certain issues or, if warranted, judgment against Ms. Sukljian, will be considered by the Board.”<sup>3</sup>
- 4) In Sukljian’s most recent discovery responses dated August 25, 2013, Sukljian made one-hundred-and-eleven (111) *separate* instances of general objections to AMH’s Discovery Requests, claiming, amongst other objections, that the requests are

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<sup>1</sup> Board’s Order 9 (emphasis added).

<sup>2</sup> *Id.* at 9.

<sup>3</sup> *Id.* at 11.

“overly broad,” “unduly burdensome,” and/or “not relevant,” in violation of the Board’s Order.

- 5) Sukljian objected to thirty-four (34) interrogatories, *as to the merits*.<sup>4</sup>
- 6) Sukljian objected to seventy-seven (77) document requests, *as to the merits*.<sup>5</sup>
- 7) Other than the box of cosmetics she produced, Sukljian’s entire production consisted of: publicly-accessible printouts of <gagapureplatinum.com>;<sup>6</sup> a WHOIS printout for <gagapureplatinum.com>; printouts of the USPTO’s correspondence with Sukljian regarding her letters of protest; Sukljian’s two requests for an extension of time to oppose AMH’s marks; and Sukljian’s Notice of Opposition to the mark HAUS OF GAGA. Nothing else.
- 8) Sukljian has not produced one invoice, one shipping document, one customer list, or one advertisement to show that the GAGA PURE PLATINUM mark was ever in use in commerce prior to, or even after, the spring of 2011, when she purported to launch a website with the domain name <gagapureplatinum.com> after AMH already had applied to register its HAUS OF GAGA mark. She has not even indicated that one customer has ever purchased a GAGA PURE PLATINUM product.
- 9) Sukljian has obstructed AMH’s attempt to conduct her deposition. AMH served Sukljian with a Notice of Deposition to commence on September 19, 2013 at 10:00 a.m. at the Albany Marriott in Albany, New York, the city where Sukljian is located,

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<sup>4</sup> Sukljian’s 34 objections to Interrogatories are set forth in more detail in AMH’s moving brief, p. 9, dated September 26, 2013.

<sup>5</sup> Sukljian’s 77 objections to Document Requests are set forth in more detail in AMH’s moving brief, p. 11.

<sup>6</sup> The WHOIS search for Sukljian’s <gagapureplatinum.com> domain name indicates a creation date of February 10, 2011, which was at least three years after Lady Gaga achieved worldwide renown and after AMH filed its application to register HAUS OF GAGA.

**as well as served a follow-up letter to confirm the deposition. To date, Sukljian has failed to respond to all attempts to conduct the deposition.**

As demonstrated in AMH's moving brief, these facts entitle AMH to entry of judgment in its favor in these Proceedings. Sukljian has not introduced a shred of evidence – as opposed to her unsworn, unsupported contention – that shows she has been using the GAGA PURE PLATINUM mark in commerce continuously since 2001, or at any time prior to her launch of a website after AMH applied to register its mark. Whether Sukljian refuses to produce evidence in violation of the Board's orders, or she simply cannot show that she consistently has been selling cosmetics under the GAGA PURE PLATINUM mark for the last twelve years, as represented in her application to register her mark, or at any time, judgment should be entered in favor of AMH and against Sukljian in both the cancellation proceeding under Cancellation No. 92055279 and the opposition proceeding under Opposition No. 91205046.

### **ARGUMENT**

#### **I. Sukljian Has Repeatedly Obstructed AMH's Discovery and Has Failed to Comply with the Board's Order**

Pursuant to Trademark Rule 2.120(g), "[i]f a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure." Federal Rule 37(b)(2)(A)(vi) authorizes "rendering a default judgment against the disobedient party." *See Benedict v. Super Bakery, Inc.*, 665 F.3d 1263, 101 U.S.P.Q.2d 1089, 81 Fed. R. Serv. 3d 363 (Fed. Cir. 2011) (affirming default judgment of cancellation based on respondent's repeated failures to comply with discovery orders). The Board has repeatedly held that default judgment is justified where there is a strong showing of willful evasion. *See MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*,

59 U.S.P.Q.2d 1477 (T.T.A.B. 2000) (repeated failure to comply with orders and unpersuasive reasons for delay resulted in entry of judgment); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1854 (T.T.A.B. 2000) (pattern of dilatory conduct indicated willful disregard of Board order and resulted in entry of judgment).

The issue in the present matter is simple: for more than a year, AMH has requested Sukljian to produce and/or identify documentary evidence that supports her contention that the GAGA PURE PLATINUM mark has been used in commerce in connection with the sale of cosmetics since 2001. Instead of producing such evidence, however, Sukljian suggests that she has met her discovery obligations merely by producing her registration which AMH is challenging in the Cancellation Proceeding; correspondence with the USPTO regarding extensions of time to respond to submissions in the Cancellation Proceeding; a copy of a WHOIS search for the <gagapureplatinum.com> domain name, which clearly indicates that the domain name was registered in 2011, not 2001;<sup>7</sup> and a box of cosmetics referenced above.

Furthermore, Sukljian admits that the <gagapureplatinum.com> website did not go “live” until after AMH filed the Cancellation Proceeding against Sukljian’s registration. In other words, Sukljian registered the domain name in 2011, but she did not launch an actual website until after AMH’s March 5, 2012 Petition to Cancel her mark. In fact, using the Internet archive resource Wayback Machine, accessible at <web.archive.org>,<sup>8</sup> a true and accurate capture of the <gagapureplatinum.com> website shows that it was still under construction on March 21, 2012. A true and accurate capture of the <gagapureplatinum.com> website on March 21, 2012 is attached as Exhibit A to the Buckley Declaration, dated October 30, 2013 (the “Buckley Declaration”). While Sukljian contends that this website was her primary channel of trade for

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<sup>7</sup> We further note that domain name registration alone does not constitute trademark use sufficient to show the validity of Sukljian’s mark.

<sup>8</sup> Wayback Machine captures accurate archives of websites on the Internet on a specific day, month and year.

her GAGA PURE PLATINUM goods since February 2011, the evidence shows no goods were offered for sale on the domain name as late as March 21, 2012.<sup>9</sup>

Sukljian's further contention that <zela.com> has been a "channel of trade" for GAGA PURE PLATINUM goods since 2001 is demonstrably false. The copy of a WHOIS search for <zela.com> upon which Sukljian purports to rely simply shows that the domain name "Zela" was registered in 2001. It does not evidence continuous use of the GAGA PURE PLATINUM mark in commerce since 2001. Revealingly, using the Internet archive Wayback Machine resource, the archive shows that on August 6, 2001, there was not an active retail website in connection with <zela.com>, let alone a website selling GAGA PURE PLATINUM products. On August 6, 2001, the <zela.com> website displayed the following text: "Coming Soon! We recently registered our domain name at... register.com." A true and accurate capture of the <zela.com> website on August 6, 2001 is attached as Exhibit B to the Buckley Declaration. In fact, even on January 3, 2006, nearly five years after Sukljian purported to be using <zela.com> as a "channel of trade" to sell goods bearing the GAGA PURE PLATINUM mark, the <zela.com> website displayed the following text: "This site is currently under construction. Please be patient. Thank you Zela Web staff." A true and accurate capture of the <zela.com> website on January 3, 2006 is attached as Exhibit C to the Buckley Declaration. There is no evidence that Sukljian ever sold GAGA PURE PLATINUM brand goods on the Zela website, and she could not have sold any prior to 2006.

In her opposition to this motion, Sukljian has conveniently selected only her responses to Interrogatory Nos. 6,<sup>10</sup> 9,<sup>11</sup> 15 and Document Request Nos. 4,<sup>12</sup> 5, 35, 41,<sup>13</sup> 58,<sup>14</sup> and 65 in an

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<sup>9</sup> Petitioner AMH filed its Cancellation Proceeding No. 92055279 on March 5, 2012.

<sup>10</sup> To date, Sukljian has still failed to answer sub-sections (a) and (d) to Interrogatory No. 6, specifically: (a) "Respondent's targeted consumer group and/or targeted demographics" and (d) "the amount of money

effort to show her compliance with the Board's Order. In these select responses, Sukljian still made objections to each and every one of these Discovery Requests without justification and in contravention of the Board's Order. Moreover, in her opposition papers, Sukljian fails to address her deficiencies (and unreasonable objections) that AMH identified in both its September 9, 2013 Deficiency Letter to Sukljian and in its moving brief. Specifically, she has failed to address her deficiencies in responding to the following Discovery Requests:

- (1) Interrogatory Nos. 1, 3, 4, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, and 21 (in both the Cancellation Proceeding and Opposition Proceeding);
- (2) Petitioner's Document Request Nos. 24, 25, 26, 28, 30, 31, 33, 42, 43, 44, 45, 60, 62, 69, and 70; and
- (3) Applicant's Document Request Nos. 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63, 64, 66, 67, 68, 69, and 70.

Unequivocally, Sukljian's persistent noncompliance with the Board's Order is a hindrance to AMH and an exhaustion of the Board's time and resources that needs to come to an end.

In summary, not only are Sukljian's self-serving statements and deficient discovery responses entirely insufficient to show that she has continuously used the GAGA PURE PLATINUM mark in commerce in connection with cosmetics since 2001, but also, the attached evidence unambiguously refutes Sukljian's claim that <zela.com> and <gagapureplatinum.com> were channels of trade for GAGA PURE PLATINUM products continuously since 2001.

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Respondent has earmarked or dedicated to the manufacture and, separately, the promotion of the Respondent's Goods bearing Respondent's Mark for 2012."

<sup>11</sup> Sukljian's response to Interrogatory No. 9 merely identifies *this* Opposition Proceeding No. 91/205,046.

<sup>12</sup> Sukljian's response to Interrogatory Nos. 4 and 5 only provides printouts from <gagapureplatinum.com>.

<sup>13</sup> Sukljian's response to Document Request Nos. 41 and 65 only provides a WHOIS registration report for <gagapureplatinum.com>.

<sup>14</sup> Sukljian's response to Document Request No. 58 only provides publicly-available documents from the USPTO website, namely Sukljian's Letters of Protest against AMH's marks and her two requests for extensions of time to oppose AMH's marks.



Further, Sukljian has not produced any evidence that she actually ever has sold any GAGA PURE PLATINUM brand cosmetics through any website or other channel. Nor has she demonstrated that she has inventory to satisfy orders that may be placed from her new <gagapureplatinum.com> website. It is by now readily apparent that Sukljian will not produce any documents that evidence her use of the GAGA PURE PLATINUM mark in commerce since 2001 or at any time thereafter. While these proceedings have been pending for well over two years, AMH still has been unable to obtain any meaningful discovery from Sukljian regarding her purported use of the GAGA PURE PLATINUM. Sukljian has made the ludicrous claim that AMH somehow admitted that she has made continuous use of her mark because, in its prior motion papers, AMH stated that she launched her website *after* AMH applied for registration of its mark. This statement obviously is not an admission that Sukljian even sold anything under the GAGA PURE PLATINUM mark, much less that she has done so consistently since 2001.

As evidenced above, there is a strong showing of Sukljian's willful evasion of discovery. Sukljian has repeatedly failed to comply with AMH's Discovery Requests, and she has further failed to comply with the Board's Order concerning discovery. There is no reason to assume that, given Sukljian's additional opportunities, she will fulfill her obligations as a party to these Proceedings. Accordingly, judgment should be entered in AMH's favor in both Proceedings, whether as a sanction for her failure to comply with discovery or because Sukljian has not shown that she has used the GAGA PURE PLATINUM mark continuously since 2001.

## **II. Sukljian's Failure to Engage in Settlement Discussions in Good-Faith**

Although Sukljian's reference to settlement in her opposition papers is a non-sequitur, and she has made bald assertions that AMH has acted in bad faith because it has not settled with her, AMH has attempted to settle with Sukljian before AMH even served its Discovery Requests.

During a telephone conference in the summer of 2012, AMH's counsel advised Sukljian that if she could provide evidence showing that she had been using the GAGA PURE PLATINUM mark continuously since 2001, AMH would be prepared to settle by making a five-figure payment to her. Furthermore, in her opposition papers, Sukljian also admits that "AMH mailed a settlement proposal letter to Respondent Christina Sukljian dated August 29, 2012," further illustrating AMH's active attempts to settle this matter in good-faith. Sukljian, however, has never replied with a *reasonable* counter proposal. The only counter proposal that AMH received in this matter was unreasonable and made in bad-faith. Sukljian's father, Ike, who was on a telephone conference call with Sukljian and AMH's counsel in the summer of 2012, said AMH's offer to pay a five-figure sum to settle based upon proof of continuous use of the mark was ridiculous and that he wants "millions of dollars" to settle.

### III. **Sukljian Fails to Respond to Deposition Notice**

AMH demonstrated in its moving brief that Sukljian has also failed to cooperate in scheduling a deposition so that AMH can confirm, under oath by Sukljian, that she has no evidence of her continuous use of the mark in commerce since 2001 and then promptly move for summary judgment in AMH's favor.<sup>15</sup> Sukljian has failed to address this point altogether. As such, Sukljian tacitly admits that she has failed to cooperate in discovery by scheduling and submitting to a deposition.

### **CONCLUSION**

Based on the evidence in the record, there is no question that Sukljian has evaded discovery and impeded the progress of these Proceedings for over a year and a half. The Board warned Sukljian "that if she does not properly respond to discovery requests as ordered herein, AMH may renew its motion for sanctions, including the sanction of entry of judgment in the

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<sup>15</sup> AMH's Br. 17-18.

cancellation.”<sup>16</sup> Sukljan has obstructed AMH’s receipt of information and documents that the Board had already determined are discoverable. As unambiguously stated in the Board’s Order, the Board will not tolerate this game playing or evasiveness in discovery.

AMH requests that judgment be entered against Sukljan for her willful disregard of the Board’s Order and her repeated failure to produce meaningful discovery responses – let alone “full and complete responses” – that address AMH’s Discovery Requests, including, but not limited to, her obvious failure to provide a stitch of evidence showing that she has used the GAGA PURE PLATINUM mark continuously in commerce since 2001. Judgment against Sukljan is appropriate and necessary as a result of Sukljan’s willful evasion of her obligations under the Federal Rules and TBMP as well as her blatant disregard of the Board’s Order.<sup>17</sup> It is also appropriate based on a lack of evidence of the validity of Sukljan’s mark.

For all of the foregoing reasons, AMH respectfully requests that judgment be entered in its favor in the Cancellation Proceeding and the Opposition Proceeding and that the Board grant it such additional and further relief that it deems just and proper.

Dated: New York, New York  
October 31, 2013

Respectfully submitted,

PRYOR CASHMAN LLP

By: 

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Lisa M. Buckley

Ryan S. Klarberg

7 Times Square

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(212) 421-4100

*Attorneys for Ate My Heart, Inc.*

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<sup>16</sup> Board’s Order 9.

<sup>17</sup> AMH alternatively requests that an order be entered precluding her from introducing any evidence not produced pursuant to AMH’s Discovery Requests and Notice of Deposition and granting Summary Judgment in favor of AMH in both proceedings because Sukljan has failed to produce any evidence of prior use of her mark or continuous use of her mark since 2001.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of U.S. Reg. No. 2,898,544 for  
GAGA PURE PLATINUM

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Respondent.	:	
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**DECLARATION OF LISA M. BUCKLEY IN  
SUPPORT OF PETITIONER ATE MY HEART, INC.'S  
MOTION FOR SANCTIONS AND REQUEST FOR JUDGMENT**

1. I am a member of the law firm of Pryor Cashman LLP, counsel for  
Petitioner/Applicant Ate My Heart, Inc. ("AMH" or "Petitioner"). I submit this declaration on  
behalf of the Petitioner in this action in support of its Motion for Sanctions and Request for  
Judgment.

2. A true and correct copy of a capture of the <gagapureplatinum.com> website on March 21, 2012 is attached as Exhibit A.<sup>1</sup>

3. A true and correct copy of a capture of the <zela.com> website on August 6, 2001 is attached as Exhibit B.

4. A true and correct copy of a capture of the <zela.com> website on January 3, 2006 is attached as Exhibit C.

Dated: New York, New York  
October 31, 2013

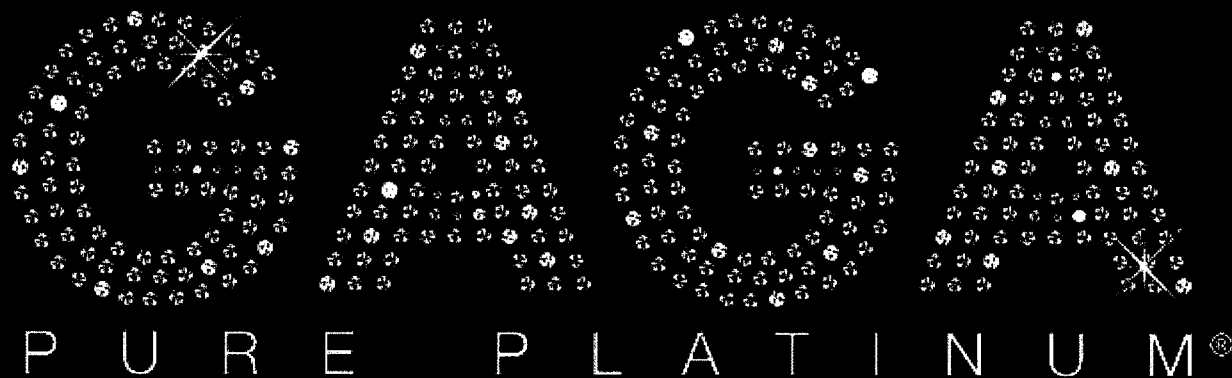


LISA M. BUCKLEY

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<sup>1</sup> The captures of the websites referenced herein were made using the Internet archive resource Wayback Machine, accessible at <web.archive.org>.

# Exhibit A



You don't mind the cyber quest do you?  
Please excuse us while we make things pretty.

✉ [info@gagapureplatinum.com](mailto:info@gagapureplatinum.com)

*Gaga Pure Platinum Cosmetics defines avant-garde beauty that is eternally fashion forward. Gaga is designed and infused with our proprietary blend of GemLust™ Jewels, precious gemstones, for the ultimate in luxurious beauty. Created by cosmetics industry mavens and second generation cosmetics purveyors, Gaga Pure Platinum continues the family's nearly half a century tradition in creating American beauty. Made with in New York USA.*

# Exhibit B



# Coming Soon!

We recently registered our domain name at...

## register.com

the first step on the web

### Additional Services

[Domain Name Search](#)  
[URL-Forwarding](#)  
[Email Services](#)  
[Incorporate Your Business](#)  
[Trademark Search](#)  
[Accept Credit Cards Online](#)  
[Web Hosting](#)

[Registre su dominio en español](#)  
[Affiliate Program](#)  
[Business Resources](#)  
[FREE Domain Name Monitoring](#)  
[Appraise Your Domain Name](#)  
[Web Site Promotion](#)

Secure a CommerceLock™ digital certificate by register.com. \$149 limited time offer.  
For a limited time, register your domain name in over 60 languages for only \$35/year.


Search for the Best Priced Web Hosting at Hostway

Disk Space	200 MB	Startup Fee	FREE	Cost Per Month	\$13.95	Go
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Check for domain name availability:

# Exhibit C

INTERNET ARCHIVE



86 captures

1 Mar 00 - 24 Jul 13

http://www.zela.com/

Go

OCT 2004

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FEB 2007

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Close

Help ?


Home



This site is currently under construction.

Please be patient.

Thank you

Zela Web staff

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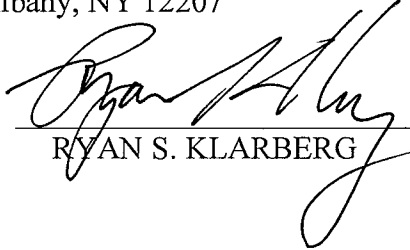
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**CERTIFICATE OF SERVICE**

I certify that on October 31, 2013, a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS AND REQUEST FOR JUDGMENT and DECLARATION OF LISA M. BUCKLEY IN SUPPORT OF PETITIONER ATE MY HEART, INC.'S MOTION FOR SANCTIONS AND REQUEST FOR JUDGMENT** was mailed by Federal Express to:

Christina Sukljian  
13 Manor Street  
Albany, NY 12207

  
\_\_\_\_\_  
RYAN S. KLARBERG